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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

THE SEATTLE ART MUSEUM,

Defendant.

NO.

PROSPECTIVE PURCHASER
CONSENT DECREE RE: THE
FORMER UNOCAL SEATTLE
MARKETING TERMINAL
PROPERTY, SEATTLE,
WASHINGTON

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I. INTRODUCTION

This prospective purchaser consent decree ("Decree") is made and entered into by and between the Washington State Department of Ecology ("Ecology") and the Seattle Art Museum ("SAM" or "Defendant").

1. WHEREAS, the purpose of this Decree is to resolve the potential liability of Defendant for known and suspected contamination at the former Unocal Seattle Marketing Terminal property (the "Site") arising from a release or threatened release of hazardous substances, to promote the public interest by expediting cleanup activities at the Site and to facilitate the cleanup and redevelopment of contaminated industrial properties in Seattle, Washington.

2. WHEREAS, a Site Diagram and Legal Description are attached as Exhibit A and a Conceptual Land Use Model for the proposed park is attached as Exhibit C.

3. WHEREAS, the Trust for Public Land has entered into a contract to acquire the Site with Union Oil Company of California ("Unocal").

4. WHEREAS, the Trust for Public Land intends to assign its right to purchase the Site to Defendant.

5. WHEREAS, Defendant has proposed to participate in the cleanup of the Site and redevelop the Site into a sculpture park consistent with applicable City of Seattle zoning provisions and comprehensive plan designations.

6. WHEREAS, in the absence of this Decree, at the time they acquire the Site, Defendant would incur potential liability under RCW 70.105D.040(1)(a) of the Model Toxics Control Act ("MTCA") for performing remedial actions, or for paying remedial costs incurred by Ecology, resulting from past releases or threatened releases of hazardous substances at the Site, and Defendant has certified that it is not otherwise currently liable under MTCA for remedial action at the Site.

1 7. WHEREAS, Defendant has developed a Cleanup Action Plan (“CAP”) to address
2 residual soil and groundwater contamination in the Upper and Lower Yards and Elliott Avenue on
3 the Site.

4 8. WHEREAS, this Decree promotes the public interest by expediting cleanup
5 activities at the Site consistent with MTCA, Chapter 70.105D RCW and its implementing rules in
6 Chapter 173-340 WAC.

7 9. WHEREAS, Defendant shall perform the remediation specified in this Decree and
8 the CAP, attached as Exhibit B, in exchange for a covenant not to sue and protection from
9 contribution actions under MTCA.

10 10. WHEREAS, Defendant’s plans for the redevelopment of the Site, as shown on
11 Exhibit C, are not likely to contribute to contamination at the Site, interfere with remedial actions
12 that may be needed on the Site, or increase human health risks to persons at or in the vicinity of
13 the Site.

14 11. WHEREAS, this Decree will provide a substantial public benefit by promoting
15 redevelopment of a former industrial site and yielding substantial new resources to facilitate
16 cleanup to prevent migration of contaminants to Elliott Bay and other areas of the Site.

17 12. WHEREAS, Defendant’s remedial actions will lead to a more expeditious cleanup
18 of hazardous substances at the Site than would otherwise occur, and will promote protection of
19 the public health and the environment.

20 13. WHEREAS, the Complaint in this action is being filed simultaneously with this
21 Decree. An answer has not been filed, and there has not been a trial on any issue of fact or law in
22 this case. However, the parties wish to resolve the issues raised by Ecology’s Complaint. In
23 addition, the parties agree that settlement of these matters without litigation is reasonable and in
24 the public interest and that entry of this Decree is the most appropriate means of resolving these
25 matters.
26

1 14. WHEREAS, the Court is fully advised of the reasons for entry of this Decree, and
2 good cause having been shown:

3 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

4 **II. AUTHORITY, JURISDICTION AND VENUE**

5 15. This Court has jurisdiction over the subject matter and over the parties pursuant to
6 MTCA, RCW 70.105D. Venue is proper in King County pursuant to RCW 70.105D.050(5)(b).

7 16. Authority is conferred upon the Washington State Attorney General by
8 RCW 70.105D.040(4)(a) and RCW 70.105D.040(5) to enter into a settlement with persons not
9 currently liable for remedial actions at a facility who propose to purchase property if, after public
10 notice, Ecology finds the proposed settlement will lead to a more expeditious cleanup of
11 hazardous substances in compliance with cleanup standards under RCW 70.105D.030(2)(e). In
12 addition, the Attorney General may agree to the settlement if the settlement will yield substantial
13 new resources to facilitate cleanup and expedite remedial action consistent with rules adopted
14 under MTCA, and Ecology finds that the redevelopment or reuse of the property is not likely to
15 contribute to the existing release or threatened release, interfere with remedial actions that may be
16 needed at the site, or increase health risks to persons at or in the vicinity of the site. RCW
17 70.105D.040(4)(b) require that such a settlement be entered as a consent decree issued by a court
18 of competent jurisdiction.

19 17. Ecology has determined that hazardous substances have been released at the Site.
20 Ecology has not made a determination that Defendant is a PLP for the Site and Defendant has
21 certified that it is not currently liable under RCW 70.105D. Were Defendant to acquire an
22 interest in the Site, however, it could become a PLP as an owner or operator under RCW
23 70.105D.040(1)(a). This Decree is entered prior to Defendant's acquisition of the Site to resolve
24 its potential liability for known or suspected Site contamination described in reports prepared by
25 Unocal, the Trust for Public Land and Defendant and their consultants and in the CAP and to
26

1 facilitate a more expeditious cleanup of the Site than otherwise would occur. This Decree is
2 entered into pursuant to the authority set forth in RCW 70.105D.040(5).

3 18. By entering into this Decree, Defendant agrees not to challenge Ecology's
4 jurisdiction in any proceeding to enforce this Decree. Defendant consents to the issuance of this
5 Decree and agrees to perform the remedial actions as specified in this Decree.

6 19. All Exhibits attached to this Decree are integral and enforceable parts of this
7 Decree.

8 **III. PARTIES BOUND**

9 20. This Decree shall apply to and be binding upon the signatories to this Decree. The
10 undersigned representative of each party hereby certifies that he or she is fully authorized to enter
11 into this Decree and to execute and legally bind such party to comply with this Decree.
12 Defendant agrees to undertake all actions required by the terms and conditions of this Decree and
13 not to contest state jurisdiction regarding this Decree. No change in ownership or corporate
14 status shall alter the responsibility of Defendant under this Decree. Defendant shall provide a
15 copy of this decree to all agents, contractors and subcontractors retained to perform work
16 required by this Decree and shall ensure that all work undertaken by such contractors and
17 subcontractors will be in compliance with this Decree.

18 21. Pursuant to RCW 70.105D.040(4)(e)(ii), Ecology has determined that this Decree
19 is based on the unique financial circumstances of and the unique redevelopment proposed by the
20 Defendant. The stay of enforcement against successors in interest in RCW 70.105D.040(4)(e)
21 therefore does not apply to this Decree.

22 **IV. DEFINITIONS**

23 22. Unless otherwise expressly provided herein, terms used in this Decree that are
24 defined in MTCA, Chapter 70.105D RCW, or in regulations promulgated under MTCA, Chapter
25 173-340 WAC, shall have the meaning assigned to them in MTCA or in such regulations.
26

1 Whenever terms listed below are used in this Decree or in the attachments hereto, the following
2 definitions shall apply:

3 “Decree” shall mean this Decree and all attachments hereto. In the event of conflict
4 between this Decree and any exhibit, this Decree shall control.

5 “Paragraph” shall mean a portion of this Decree identified by an Arabic numeral.

6 “Section” shall mean a portion of this Decree identified by a Roman numeral and including
7 one or more Paragraphs.

8 “Site” shall mean the former Unocal Seattle Marketing Terminal depicted on and legally
9 described in Exhibit A, attached hereto and incorporated herein by this reference, exclusive of any
10 tidelands west of the Off-site Area. The Site consists of four areas: Upper Yard; Elliott Avenue;
11 Lower Yard; and Off-site Area (including Alaskan Way and BNRR right-of-way). The Site is a
12 “facility” as defined in MTCA per RCW 70.105D.020(4).

13 “Successors in Interest and Assigns” shall mean any person who acquires an interest in the
14 Site through purchase, lease, transfer, assignment, or otherwise.

15 **V. STATEMENT OF FACTS**

16 23. The Site is located east of Elliott Bay near Pier 70 in downtown Seattle,
17 Washington, and consists of the following four areas:

- 18 • Upper Yard;
- 19 • Elliott Avenue;
- 20 • Lower Yard; and
- 21 • Off-Site Area (including Alaskan Way and BNRR right-of-way).

22
23 It is bordered by Western Avenue on the east, Bay Street on the north, and Broad Street and a
24 private property on the south. The western boundary is Elliott Bay. A Site Diagram is attached
25 as Exhibit A.

1 24. The Site was used by Unocal for fuel transfer and distribution from the early 1900s
2 to 1975. Unocal continued to occupy an office building at the intersection of Western Avenue and
3 Broad Street until December 1986.

4 25. The former Unocal terminal facility contained numerous above-grade product
5 storage tanks, above- and below-grade product pipelines, loading racks, and a tanker loading
6 dock (Pier 71). Unocal stored or used a variety of petroleum products at the Site including
7 gasoline (leaded and unleaded), petroleum-based solvents, diesel fuel, lubricating (lube) oil, motor
8 oils, and grease. Since 1988, Unocal has demolished the tanker loading dock and removed the
9 structures on the Upper and Lower Yards. The pipeline tunnel beneath Elliott Avenue still
10 remains, and abandoned underground fuel lines are still present beneath Alaskan Way and the
11 BNRR right-of-way.

12 26. Numerous environmental investigations have been conducted at the Site by
13 Unocal. Elevated concentrations of petroleum hydrocarbons have been encountered in soil and
14 groundwater within the four compliance areas identified by Ecology (including the Upper and
15 Lower Yards, Elliott Avenue, and the Off-Site Area.)

16 27. In 1988, Unocal entered into an Order on Consent with Ecology to remediate
17 petroleum-containing soils and groundwater at the Site. The Order identified cleanup targets for
18 the four compliance areas at the site (see Tables 1 and 2 in the Order). Ecology amended the
19 Order four times over the years. As part of Amendment No. 4, Remediation Action Levels
20 (RALs) were established for Lower Yard soil and groundwater. Soils in the Lower Yard with
21 constituent concentrations exceeding the cleanup targets but below RALs could remain on the
22 Site under a concrete cap foundation proposed by real estate developers planning to buy the site
23 pending appropriate deed restrictions. Amendment No. 4 also required Unocal to treat
24 groundwater discharging from the Lower Yard if constituent concentrations exceed the RALs.

25 28. Pursuant to the Order, Unocal conducted extensive remedial actions at the Site.
26 Unocal removed approximately 57,000 tons of petroleum-contaminated soil from the Upper Yard.

1 In general, petroleum hydrocarbon concentrations in soils remaining in the Upper Yard do not
2 statistically exceed the 200 mg/kg cleanup target for residential land use. However,
3 approximately 110 cubic yards of soils exceeding the Order's petroleum cleanup target levels still
4 remain along the northwestern boundary with Elliott Avenue. Unocal was unable to excavate
5 these soils because of their depth (approximately 16 to 26 feet below ground surface) and
6 proximity to the shoring wall adjacent to Elliott Avenue. Post excavation groundwater
7 compliance monitoring results within the northwestern portion of the Upper Yard periodically
8 exceed petroleum cleanup target levels and contain product sheen.

9 29. At the Lower Yard, Unocal excavated approximately 60,000 tons of soil exceeding
10 the petroleum RAL and removed and treated a large volume of petroleum-containing
11 groundwater. The upper 95 percent confidence limit of the mean for TPH concentrations
12 remaining in Lower Yard soils (approximately 1,300 mg/kg) is above the cleanup target level of
13 200 mg/kg but is well below the 7,500 mg/kg RAL. The average carcinogenic polycyclic
14 aromatic hydrocarbon (CPAH) concentration remaining in the Lower Yard is 0.6 mg/kg. Post
15 excavation groundwater compliance monitoring results in the northern portion of the Lower
16 Yard, particularly in the northwestern corner, periodically exceed cleanup target levels and
17 contain product sheen.

18 30. Unocal has performed interim remedial actions within the Off-Site Area including
19 pumping and treating groundwater and in-situ bioremediation using an infiltration gallery to treat
20 soil. A final remedy has not yet been selected for the Off-Site Area. Additional site
21 characterization conducted in the Off-Site Area showed the presence of elevated petroleum
22 hydrocarbons in the soil, primarily within the saturated zone (which includes the smear zone and
23 capillary fringe). Petroleum-contaminated soils and groundwater, including free product, are
24 present within the Alaskan Way corridor and beneath the BNRR railroad tracks. Groundwater
25 quality in the portion of the Off-Site Area adjacent to the former pipeline corridor continues to
26

1 exceed cleanup target levels. Groundwater pumping and treatment is currently in progress in the
2 Off-Site Area.

3 31. Interim remedial actions were also performed within the northern portion of the
4 Elliott Avenue Area. These include in-situ bioremediation using an infiltration gallery to treat soil.
5 Unocal has conducted a supplemental site characterization in the Elliott Avenue Area since the
6 interim actions, and monitoring results showed the presence of elevated petroleum hydrocarbons
7 in the soil and groundwater. Free product recovery is still being performed by Unocal at wells
8 MW-30 and MW-59 located adjacent to the pipeline tunnel. Small quantities (less than one liter)
9 of free product have been removed from these wells via hand bailing, because other treatment
10 methods used (e.g., pump and treat) were found not to be effective. Groundwater in the vicinity
11 of the pipeline tunnel still exceeds cleanup target levels.

12 32. The Trust for Public Land and Defendant have performed additional investigation
13 of the Site, pursuant to MTCA, to further define the nature and extent of residual contamination
14 that remains on the Site. The findings of this investigation are summarized in the Focused
15 Supplemental Site Characterization report prepared by Hart Crowser, dated September 30, 1999.
16 Based on the site characterization data obtained by this study as well as by Unocal, environmental
17 conditions at the site include:

18 A. Inaccessible petroleum-contaminated soil wedged in the northwest portion of the
19 Upper Yard at depths of 16 to 26 feet below ground surface. Petroleum-contaminated
20 groundwater and intermittent product sheen have also been encountered at this location;

21 B. Petroleum-contaminated soils with TPH concentrations above MTCA Methods A
22 or B cleanup levels beneath the northern portion of Elliott Avenue. Petroleum-contaminated
23 groundwater and free product of a viscous nature have also been encountered in this area;

24 C. Petroleum-contaminated soils with TPH concentrations above MTCA Methods A
25 or B cleanup levels wedged at the eastern portion of the Lower Yard along Elliott Avenue and the
26 northern portion of the Lower Yard along Bay Street;

1 D. Petroleum-contaminated soil with TPH concentrations above MTCA Methods A
2 or B cleanup levels beneath the Off-Site Area. Petroleum-contaminated groundwater and free
3 product consisting of gasoline- and diesel-range hydrocarbons have also been encountered in the
4 northern portion of the Off-Site Area;

5 E. Hydrocarbon vapors exceeding MTCA Method B air cleanup levels have been
6 encountered in subsurface soils within the western portion of the Upper Yard, the northern
7 portion of Elliott Avenue, the Lower Yard, and the northern portion of the Off-Site Area.
8 Computer modeling results predicted that hydrocarbon vapor emissions would not impact the
9 ambient air quality above MTCA Method B Air Cleanup Levels for the Site. However, the model
10 predicted potential hydrocarbon vapor emission impacts to the indoor air quality above MTCA
11 Method B Air Cleanup Levels at the southern portion of the Lower Yard and the western portion
12 of the Upper Yard.

13 33. Given the environmental conditions described above, a Supplemental Focused
14 Feasibility Study was prepared by Hart Crowser dated September 30, 1999, which analyzed
15 remedial alternatives and identified appropriate cleanup standards as required pursuant to MTCA.
16 Based on the results of the Supplemental Focused Feasibility Study, Defendant proposed and
17 Ecology approved a final remedy as outlined in the WORK TO BE PERFORMED, Section VII,
18 below and as described more fully in the attached CAP, Schedule and Air Sampling/Monitoring
19 and Contingency Plan attached as Exhibits B, E and F.

20 VI. DESCRIPTION OF PLANNED PROJECT

21 34. Defendant intends to acquire the Site.

22 35. Defendant plans to create a public sculpture park at the Site. The park will include
23 sculptures, pedestrian trails, and landscaped open space. The Upper Yard will also contain an
24 underground parking lot. An exhibition building and accessory structures (e.g., restrooms,
25 espresso stands) may be placed on the Upper and/or Lower Yards. The Off-Site Area will consist
26 of a shoreline promenade, an extension of the Myrtle Edwards Park waterfront bike trail,

1 landscaped open space, possibly paved parking areas and small slab-on-grade structures.
2 Pedestrian bridges will connect the three areas. A detailed outline of the proposed park is
3 contained in the attached Site Map and Conceptual Land Use Model attached as Exhibits A and
4 C.

5 36. Ecology has not picked a final remedy in the Off-site Area and there is an ongoing
6 interim remedial action in the Off-site Area. Defendant shall cooperate with Ecology and any
7 PLPs in the continued remediation of the Off-site Area, including on-going groundwater
8 remediation by Unocal pursuant to the Order, and take any action reasonably necessary to
9 facilitate cleanup and monitoring of the Off-site Area. Defendant shall maintain the existing cap
10 in the Off-site Area and if that cap is altered during site development, it shall be replaced with a
11 low permeability cap as described in the CAP. If the final remedy requires the filing of a
12 restrictive covenant in the Off-site Area, Defendant shall file a restrictive covenant approved by
13 Ecology and shall use best efforts to obtain restrictive covenants from the City of Seattle and
14 Burlington Northern Railroad for the Off-site Area, when Ecology notifies the Defendant that it
15 has picked a final remedy there.

16 **VII. WORK TO BE PERFORMED, SCHEDULE**
17 **AND LAND USE RESTRICTIONS**

18 37. This Decree contains a program designed to protect public health, welfare, and the
19 environment from the known, suspected, or threatened release of hazardous substances or
20 contaminants at, on, or from the Site. The requirements of such program are described in detail in
21 this section of the Decree and in the Cleanup Action Plan (Exhibit B) and in the schedule set forth
22 in Exhibit E.

23 38. Defendant agrees to perform the remedial actions herein and as described in the
24 CAP and Schedule to eliminate direct contact, vapor exposure pathways and other exposure
25 pathways to known or suspected hazardous substances at or from the Site (including the Upper
26 Yard, Elliott Avenue, and Lower Yard), minimize surface water infiltration to enhance ongoing

1 groundwater remediation activities, and protect human health and the environment from the
2 release or threatened release of known or suspected hazardous substances at or from the Site.

3 39. Defendant shall perform remedial actions in the attached CAP and the Draft Air
4 Sampling/Monitoring and Contingency Plan pursuant to the Schedule attached at Exhibit E.
5 Defendant, through its contractor(s) and subcontractor(s) as necessary, shall accomplish the
6 following tasks:

- 7 a) Task 1: Implement the Cleanup Action Plan (CAP), Exhibit B.
- 8 i. Implement the short-term air sampling/monitoring program, as
9 outlined in Exhibit F.
- 10 ii. Implement the long-term air sampling/monitoring plan program, as
11 outlined in Exhibit F.
- 12 iii. Implement Ambient Air Contingency Plan, as outlined in Exhibit F,
13 if necessary.
- 14 iv. Cap Northern Portions of the Upper Yard with Low Permeability
15 Material; Use Engineering Controls to address Indoor Air Impacts,
16 if necessary; Install Ambient Air Monitoring Station, if necessary.
- 17 v. Cap Lower Upper Yard with Low Permeability Material; Use
18 Engineering Controls to address Indoor Air Impacts, if necessary;
19 Install Ambient Air Monitoring Station, if necessary.
- 20 vi. Cap the Off-site Area with Low Permeability Material, if existing
21 Cap if Removed; Install Ambient Air Monitoring Station, if
22 necessary.
- 23 vii. Implement institutional controls and security system at the Site.
- 24 viii. Implement Restrictive Covenants as contained in Exhibit D.
- 25 b) Task 2: Provide for public participation.
- 26 c) Task 3: Provide Remedial Design.
- d) Task 4: Implement the Compliance Monitoring Program as outlined in
Exhibit F, which also includes:
- i. Protection Monitoring.

1 ii. Performance Monitoring.

2 iii. Confirmation Monitoring.

3 e) Task 5: Implement Schedule attached hereto as Exhibit E.

4 Defendant agrees not to perform any remedial actions on the Site that are inconsistent with the

5 remedial actions required under this Consent Decree.

6 40. Defendant shall obtain any and all state, federal, or local permits required by

7 applicable law before commencing the remedial action at the Site, except as provided in

8 Section XXI. Defendant shall prepare a Site Safety and Health Plan in accordance with WAC

9 173-340-810 and the most recent OSHA, WISHA, Ecology, and EPA guidance and applicable

10 regulations, for Ecology review. Defendant shall also provide a security system at the Site

11 designed to prevent entry by unauthorized persons during construction. Following public opening

12 of the site, use and access shall be managed at all hours of the day and night.

13 41. Defendant shall be prohibited from using the Site in a manner likely to cause or

14 contribute to the existing release, interfering with remedial actions performed or that may be

15 needed at the Site, or increasing health risks to persons or risks to the environment at or in the

16 vicinity of the Site. Defendant agrees to ensure that its Successors in Interest and Assigns are

17 prohibited from using the Site in a manner likely to cause or contribute to the existing release,

18 interfering with remedial actions that are performed or may be needed at the Site, or increasing

19 health risks to persons or risks to the environment at or in the vicinity of the Site.

20 42. Defendant shall file the Restrictive Covenants attached at Exhibit D for the Upper

21 Yard, Elliott Avenue and Lower Yard no later than February 1, 2000. Any other restrictive

22 covenant required in the future shall be filed pursuant to the terms of this Decree. If Defendant

23 must implement the contingency plan outlined in Exhibit F based on the results of ambient air

24 monitoring, Ecology may require and Defendant shall file revised Restrictive Covenants to

25 address these ambient air issues. With Ecology's prior written approval, and after completion of

26 the remedial action required by this Decree, Defendant, or its Successors in Interest and Assigns,

1 may record an instrument that provides that the Restrictive Covenants provided in Exhibit D and
2 those to be filed in the future shall no longer limit uses of the Site or be of any further force of
3 effect.

4 **VIII. ECOLOGY COSTS**

5 43. Defendant agrees to pay past costs from August 10, 1999 to present and future
6 costs incurred by Ecology pursuant to this Decree. These costs shall include work performed by
7 Ecology or its contractors for, or on, the Site under Chapter 70-105D RCW, for investigations,
8 remedial actions, oversight and administration associated with this Decree (including preparation
9 and negotiation of this Decree). Ecology costs shall include costs of direct activities and support
10 costs of direct activities as defined in WAC 173-340-550(2). Defendant agrees to pay the
11 required amount within ninety (90) days of receiving from Ecology an itemized statement of costs
12 that includes a summary of costs incurred, an identification of involved staff, and the amount of
13 time spent by involved staff members on the project. A general statement of work performed will
14 be provided upon request. Itemized statements and costs shall be prepared quarterly. Failure to
15 pay Ecology costs within ninety (90) days of receipt of the itemized statement will result in
16 interest charges as allowed by law. Defendant reserves the right to review and approve any
17 charges prior to payment. Any dispute regarding remedial and investigation costs for the Site
18 shall be subject to dispute resolution pursuant to Section XIV. Defendant reserves the right to
19 pay the undisputed portion of an invoice and not pay the disputed portion.

20 **IX. DESIGNATED PROJECT COORDINATORS**

21 44. The project coordinator for Ecology is:

22 Nnamdi Madakor
23 Toxics Cleanup Program
24 Department of Ecology
25 Northwest Regional Office
26 3190 160th Avenue Southeast
Bellevue, WA 98008
Telephone: (425) 649-7000

1
2 The project coordinator for Defendant is:

3 Chris Rogers
4 Seattle Art Museum
5 P.O. Box 22000
6 Seattle, WA 98122
7 Telephone: (206) 654-3221

8 45. Each project coordinator shall be responsible for overseeing the implementation of
9 this Decree. The Ecology project coordinator will be Ecology's designated representative at the
10 Site. To the maximum extent possible, communications between Ecology and Defendant and all
11 documents, including reports, approvals, and other correspondence concerning the activities
12 performed pursuant to the terms and conditions of this Decree, shall be directed through the
13 project coordinators. The project coordinators may designate, in writing, working-level staff
14 contacts for all or portions of the implementation of the Work to be Performed and attached
15 Cleanup Action Plan. The project coordinators may agree to minor modifications to the work to
16 be performed without formal amendments to this Decree.

17 46. Any party may change its respective project coordinator. Written notification shall
18 be given to the other parties at least ten (10) calendar days prior to the change.

19 **X. PERFORMANCE**

20 47. All work performed pursuant to this Decree shall be under the direction and
21 supervision, as necessary, of a professional engineer or hydrogeologist, or equivalent, with
22 experience and expertise in hazardous waste site investigation and cleanup. Any construction
23 work must be under the supervision of a professional engineer. Defendant shall notify Ecology in
24 writing as to the identity of such engineer(s) or hydrogeologist(s), or others and of any
25 contractors and subcontractors to be used in carrying out the terms of this Decree, in advance of
26 their involvement at the Site.

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1 become effective upon entry by the Court or upon a later date if such date is expressly stated in
2 the parties' written stipulation or the Court so orders.

3 54. Amendments may cover any subject or be for any purpose agreed to by the parties
4 to this Decree. If Ecology determines that the subject of an amendment requires public input,
5 Ecology shall provide thirty (30) days public notice prior to seeking entry of the amendment from
6 the Court.

7 **XIV. DISPUTE RESOLUTION**

8 55. In the event a dispute arises as to an approval, disapproval, proposed modification,
9 or other decision or action by Ecology's project coordinator, the parties shall use the dispute
10 resolution procedure set forth below.

- 11 a) Upon receipt of the Ecology project coordinator's decision, Defendant has
12 fourteen (14) days to notify Ecology's project coordinator of any objection
13 to the decision.
- 14 b) The parties' project coordinators shall then confer in an effort to resolve
15 the dispute. If the project coordinators cannot resolve the dispute within
16 fourteen (14) days of Defendant's objection, Ecology's project coordinator
17 shall issue a written decision.
- 18 c) Defendant may then request Ecology management review of the decision.
19 This request shall be submitted in writing to the Toxics Cleanup Program
20 Manager within seven (7) days of receipt of Ecology's project
21 coordinator's written decision.
- 22 d) Ecology's Toxics Cleanup Program Manager shall conduct a review of the
23 dispute and shall issue a written decision regarding the dispute within thirty
24 (30) days of Defendant's request for review. The Toxics Cleanup Program
25 Manager's decision shall be Ecology's final decision on the disputed
26 matter.

56. If Ecology's final written decision is unacceptable to Defendant, Defendant shall
have the right to submit the dispute to the Court for resolution. The parties agree that one judge
should retain jurisdiction over this case and shall as necessary, resolve any dispute arising under

1 this Decree. In the event Defendant presents an issue to the Court for review, the Court shall
2 review the action or decision of Ecology under an arbitrary and capricious standard of review.

3 57. The parties agree to use the dispute resolution process in good faith and agree to
4 expedite, to the extent possible, the dispute resolution process whenever it is used. When either
5 party uses the dispute resolution in bad faith or for purposes of delay, the other party may seek
6 sanctions.

7 58. The implementation of these dispute resolution procedures shall not provide a
8 basis for delay of any activities required in this Decree, unless Ecology agrees in writing to a
9 schedule extension or the Court so orders.

10 **XV. CONTRIBUTION PROTECTION**

11 59. With regard to claims for contribution against Defendant for matters addressed in
12 this Decree, Ecology agrees that Defendant is entitled to protection from contribution actions or
13 claims as is provided by MTCA, RCW 70.105D.040, or as otherwise provided by law.

14 **XVI. COVENANT NOT TO SUE UNDER MTCA; REOPENERS**

15 60. In consideration of compliance by Defendant with the terms and conditions of this
16 Decree, Ecology agrees that compliance with this Decree shall stand in lieu of any and all
17 administrative, legal, and equitable remedies and enforcement actions available to Ecology against
18 Defendant for the release or threatened release of known or suspected hazardous substances at
19 the Site covered by the terms of this Decree. Ecology covenants not to sue Defendant, its
20 Successors in Interest and Assigns for matters covered by the terms of this Decree, provided that
21 Defendant, or its Successors in Interest and Assigns have substantially complied with this Decree.

22 A. Reopeners: In the following circumstances the State of Washington may
23 exercise its full legal authority to address releases of hazardous substances at the Site
24 notwithstanding the Covenant Not to Sue set forth above:
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1. In the event Defendant fails to comply with the terms and conditions of this Decree, including all attachments, and, after written notice of noncompliance, fails to come into compliance.
2. In the event new information becomes available regarding factors previously unknown to Ecology, and Ecology determines, in light of this information, that further remedial action is necessary at the Site to protect human health or the environment.
3. In the event the remedial action conducted at the Site fails to meet the requirements set forth in Section VII of this Decree and the attached Cleanup Action Plan.
4. In the event the Site is used for any activities that contribute to the existing release or threatened release, interfere with remedial actions that may be needed at the Site, or increase health risks to persons at or in the vicinity of the Site.

B. Applicability. The Covenant Not To Sue set forth above shall have no applicability whatsoever to:

1. Criminal liability;
2. Any Ecology action against PLPs not party to this Decree; and
3. Any claims by the State for Natural Resources Damages.

XVII. DEFENDANT’S RESERVATION OF RIGHTS

61. Defendant reserves all rights and defenses which it may have and which are not otherwise addressed in the Decree.

62. Except as provided herein for Defendant, this Decree does not grant any rights or affect any liabilities of any person, firm or corporation or subdivision or division of state, federal, or local government.

XVIII. DISCLAIMER

63. This Decree does not constitute a representation by Ecology that the Site is fit for any particular purpose.

1 **XIX. RETENTION OF RECORDS AND 5-YEAR REVIEW**

2 64. Defendant shall retain all records, reports, documents, and underlying data in its
3 possession relevant to the implementation of this Decree during the pendency of this Decree and
4 for a period of ten years following the termination of this Decree pursuant to Paragraph 80, and
5 shall insert in contracts with project contractors and subcontractors a similar records retention
6 requirement. Upon request of Ecology, Defendant shall make all non-archived records available
7 to Ecology and allow Ecology reasonable access for record review. All archived records shall be
8 made available to Ecology by Defendant within a reasonable period of time.

9 65. As remedial action, including ambient/indoor air monitoring, continues at the Site,
10 the parties agree to review the progress of remedial action at the Site, and to review the data
11 accumulated as a result of site monitoring as often as is necessary and appropriate under the
12 circumstances or as agreed upon in the Draft Air Sampling/Monitoring and Contingency Plan for
13 the Site, Exhibit F. The parties agree to meet to discuss the Site status every five years upon
14 request from Ecology, if necessary, or at Defendant's request. This provision shall remain in
15 effect for the duration of the Decree.

16 **XX. SITE ACCESS**

17 66. Defendant grants to Ecology, its employees, agents, contractors, and authorized
18 representatives, an irrevocable right to enter upon the Site, with reasonable notice and at any
19 reasonable time, for purposes of allowing Ecology to monitor or enforce compliance with this
20 Decree, to oversee remedial actions done by PLP's not a party to this Decree, or to institute other
21 necessary cleanup actions. Ecology or any Ecology authorized representatives shall have the
22 authority to enter and freely move about the Site at all reasonable times for the purposes of, inter
23 alia: inspecting records, operation logs, and contracts related to the work being performed
24 pursuant to this Decree; reviewing Defendant's progress in carrying out the terms of this Decree;
25 conducting such tests or collecting such samples as Ecology may reasonably deem necessary;
26 using a camera, sound recording, or other documentary type equipment to record work done

pursuant to this Decree; and verifying the data submitted to Ecology by the Defendant. All parties with access to the Site pursuant to this Paragraph shall comply with approved health and safety plans.

67. Notwithstanding any provision of this Decree, Ecology retains all of its access authorities and access rights, including enforcement authorities related thereto, under MTCA and any other applicable state statute, regulation or order. Nothing in this Decree shall limit any right of access Ecology may have concerning releases of hazardous substances not addressed by this Decree. Ecology's entry onto the Site for purposes of monitoring or enforcing compliance with this Decree or implementing further remediation at the Site may interfere with Defendant's full use of the Site. The right of entry granted in this Section is in addition to any right Ecology may have to enter onto the Site pursuant to specific statutory or regulatory authority. Defendant further agrees to cooperate with Ecology and other PLPs as reasonable necessary to facilitate any further cleanup or monitoring Ecology determines is required on the Site. Consistent with Ecology's responsibilities under state and federal law, Ecology, and any persons acting for it, shall use reasonable efforts to minimize any interference and shall use reasonable efforts not to interfere with the operations of Defendant by any such entry. In the event Ecology enters the Site for reasons other than emergency response, Ecology agrees that it shall provide reasonable advance notice to Defendant of any planned entry, as well as schedules and locations of activity on the Site. Ecology further agrees to accommodate reasonable requests that it modifies its scheduled entry or activities at the Site.

XXI. OTHER APPLICABLE LAWS

68. All actions carried out by Defendant pursuant to this Decree shall be done in accordance with all applicable federal, state, and local requirements, including applicable permitting requirements. Pursuant to RCW 70.105D.090(1), the known and applicable substantive requirements of Chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW, and any laws requiring or authorizing local government permits or approvals for remedial action, have

1 | been included in the CAP and are incorporated by reference herein as binding and enforceable
2 | requirements in this Decree.

3 | 69. Defendant has a continuing obligation to determine whether additional permits or
4 | approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action
5 | under this Decree. In the event either Defendant or Ecology determines that additional permits or
6 | approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action
7 | under this Decree, it shall promptly notify the other party of this determination. Ecology shall
8 | determine whether Ecology or Defendant shall be responsible to contact the appropriate state
9 | and/or local agencies. If Ecology so requires, Defendant shall promptly consult with the
10 | appropriate state and/or local agencies and provide Ecology with written documentation from
11 | those agencies of the substantive requirements those agencies believe are applicable to the
12 | remedial action. Ecology shall make the final determination on whether the additional substantive
13 | requirements must be met by Defendant and on how Defendant must meet those requirements.
14 | Ecology shall inform Defendant in writing of these requirements and Defendant shall have an
15 | opportunity to comment on such requirements. Once established by Ecology, the additional
16 | requirements shall be enforceable requirements of this Decree. Defendant shall not begin or
17 | continue the remedial action potentially subject to the additional requirements until Ecology
18 | makes its final determination.

19 | 70. Ecology shall ensure that notice and opportunity for comment is provided to the
20 | public and appropriate agencies prior to establishing the substantive requirements under this
21 | section.

22 | 71. Pursuant to RCW 70.105D.090(2), in the event that Ecology determines that the
23 | exemption from complying with the procedural requirements of the laws referenced in RCW
24 | 70.105D.090(1) would result in the loss of approval from a federal agency necessary for the state
25 | to administer any federal law, such exemption shall not apply and Defendant shall comply with
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1 both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1),
2 including any requirements to obtain permits.

3 **XXII. SAMPLING, DATA REPORTING, AND AVAILABILITY**

4 72. With respect to the implementation of this Decree, Defendant shall make the
5 results of all sampling, laboratory reports, and/or test results generated by it, or on its behalf
6 available to Ecology and shall submit these results in accordance with Section XXIII of this
7 Decree.

8 73. If requested by Ecology, Defendant shall allow split or duplicate samples to be
9 taken by Ecology and/or Ecology's authorized representatives of any samples collected by
10 Defendant pursuant to the implementation of this Decree. Defendant shall notify Ecology at least
11 seven (7) working days in advance of any sample collection or work activity at the Site. Ecology
12 shall, upon request, allow split or duplicate samples to be taken, at Defendant's sole expense, by
13 Defendant, or its authorized representatives, of any samples collected by Ecology pursuant to the
14 implementation of this Decree, provided it does not unreasonably interfere with the Department's
15 sampling. Without limiting Ecology's rights under Section XX, Ecology shall endeavor to notify
16 Defendant at least five (5) working days prior to any sampling collection activity.

17 **XXIII. PROGRESS REPORTS**

18 74. Defendant shall submit to Ecology written progress reports that describe the
19 actions taken to implement the requirements of this Decree. The progress report shall be
20 prepared as set forth in the following schedule:

21 *Quarterly during remedial design activities; and

22 *Monthly during remedial action construction phase activities.

23 The progress reports shall contain the following:

- 24 A. A list of on-Site activities that have taken place during the reporting period;
25 B. Detailed description of any deviations from required tasks not otherwise
26 documented in project plans or amendment requests;

1 C. Description of all deviations from the schedule during the current reporting
2 period and any planned deviations in the upcoming reporting period;

3 D. For any deviations in schedule, a plan for recovering lost time and
4 maintaining compliance with the schedule;

5 E. All data (including laboratory analyses) which, after the QA/QC program
6 has been performed, have been received by Defendant during the past reporting period and an
7 identification of the source of the samples; and

8 F. A list of deliverables for the upcoming reporting period if different from the
9 schedule.

10 75. All progress reports shall be submitted by the tenth day of the month following
11 each reporting period after the effective date of this Decree. Unless otherwise specified, progress
12 reports and any other documents submitted pursuant to this Decree shall be sent by certified mail,
13 return receipt requested, to Ecology's project coordinator.

14 **XXIV. EXTENSION OF SCHEDULE**

15 76. An extension of schedule shall be granted only when a request for an extension is
16 submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline
17 for which the extension is requested, and when good cause exists for granting the extension. All
18 extensions shall be requested in writing. The request shall specify the reason(s) the extension is
19 needed.

20 77. An extension shall only be granted for such period of time as Ecology determines
21 is reasonable under the circumstances. A requested extension shall not be effective until approved
22 by Ecology. Ecology shall act upon any written request for extension in a timely fashion. It shall
23 not be necessary to formally amend this Decree pursuant to Section XIII when a schedule
24 extension is granted.

25 78. The burden shall be on Defendant to demonstrate to the satisfaction of Ecology
26 that the request for such extension has been submitted in a timely fashion and that good cause

exists for granting the extension. Good cause includes, but is not limited to, the following:

- (1) circumstances beyond the reasonable control and despite the due diligence of Defendant, including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by Defendant; or (2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or (3) endangerment as described in Section XXV.

79. However, neither increased costs of performance of the terms of the Decree nor changed economic circumstances shall be considered circumstances beyond the reasonable control of Defendant.

80. Ecology may extend the schedule for a period not to exceed ninety (90) days, except where an extension is needed as a result of:

- (1) Delays in the issuance of a necessary permit that was applied for in a timely manner; or
- (2) Other circumstances deemed exceptional or extraordinary by Ecology; or
- (3) Endangerment as described in Section XXV.

81. Ecology shall give Defendant written notification in a timely fashion of any extensions granted pursuant to this Decree.

XXV. ENDANGERMENT

82. In the event Ecology determines that activities implementing or in noncompliance with this Decree, or any other circumstances or activities, are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order Defendant to stop further implementation of this Decree for such period of time as needed to abate the danger or may petition the Court for an order as appropriate. During any stoppage of work under this Section, the obligations of Defendant with respect to the work under this Decree that is ordered to be stopped shall be suspended and the time periods for performance of that work, as well as the time period for any other work

1 dependent upon the work that is stopped, shall be extended, pursuant to Section XXIV of this
2 Decree, for such period of time as Ecology determines is reasonable under the circumstances.

3 83. In the event Defendant determines that activities undertaken in furtherance of this
4 Decree or any other circumstances or activities are creating an endangerment to the people on the
5 Site or in the surrounding area or to the environment, Defendant may stop implementation of this
6 Decree for such period of time necessary for Ecology to evaluate the situation and determine
7 whether Defendant should proceed with implementation of the Decree or whether the work
8 stoppage should be continued until the danger is abated. Defendant shall notify Ecology's project
9 coordinator as soon as possible, but no later than twenty-four (24) hours after such stoppage of
10 work, and thereafter provide Ecology with documentation of the basis for the work stoppage. If
11 Ecology disagrees with Defendant's determination, it may order Defendant to resume
12 implementation of this Decree. If Ecology concurs with the work stoppage, Defendant's
13 obligations shall be suspended and the time period for performance of that work, as well as the
14 time period for any other work dependent upon the work that was stopped, shall be extended,
15 pursuant to Section XXIV of this Decree, for such period of time as Ecology determines is
16 reasonable under the circumstances.

17 **XXVI. IMPLEMENTATION OF REMEDIAL ACTION**

18 84. If Ecology determines that Defendant has failed without good cause to implement
19 the remedial action described herein and in the CAP, Ecology may, after notice to Defendant,
20 perform any or all portions of the remedial action that remain incomplete. If Ecology performs all
21 or portions of the remedial action because of Defendant's failure to comply with the obligations
22 under this Decree, Defendant shall reimburse Ecology for the costs of doing such work, provided
23 that Defendant shall not be obligated under this Section to reimburse Ecology for costs incurred
24 for work inconsistent with or beyond the scope of this Decree.

XXVII. PUBLIC PARTICIPATION

85. Ecology shall maintain the responsibility for public participation at the Site. However, Defendant shall cooperate with Ecology with respect to the following public participation activities:

A. Prepare drafts of public notices and fact sheets at important stages of the remedial action, such as the submission of work plans and engineering design reports. Ecology will finalize (including editing if necessary) and distribute such fact sheets and prepare and distribute public notices of Ecology's presentations and meetings;

B. Each party shall notify the other party's project coordinator prior to the preparation of all press releases and fact sheets, and at least one week before major meetings with the interested public and local governments regarding the remediation of the Site. Likewise, Ecology shall notify Defendant prior to the issuance of all press releases and fact sheets, and before major meetings with the interested public and local governments;

C. Participate in public presentations on the progress of the remedial action at the Site. Participation may be through attendance at public meetings to assist in answering questions, or as a presenter;

D. In cooperation with Ecology, arrange and/or continue information repositories to be located at the following locations:

Seattle Public Library
Downtown Branch
Government Documents
1000 4th Avenue, 2nd Floor
Seattle, Washington

Department of Ecology
Northwest Regional Office
3190 160th Avenue Southeast
Bellevue, Washington 98008

Seattle Art Museum Library
100 University St., 5th Floor

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Seattle, Washington

At a minimum, copies of all public notices, fact sheets, and press releases, all quality assured monitoring data, remedial action plans, supplemental remedial planning documents, and all other similar documents relating to performance of the remedial action required by this Decree shall be promptly placed in these repositories.

**XXVIII. DURATION OF DECREE AND RETENTION OF JURISDICTION;
CERTIFICATIONS BY ECOLOGY**

86. This Decree shall remain in effect and this Court shall retain jurisdiction over both the subject matter of this Decree and the parties for the duration of the performance of the terms and provisions of this Decree for the purpose of enabling any of the parties to apply to the Court, consistent with the dispute resolution process set forth in Section XIV, and the amendment process set forth in Section XIII, for such further order, direction, and relief as may be necessary or appropriate to ensure that obligations of the parties have been satisfied. The Decree shall remain in effect until Defendant has received written notification from Ecology that the requirements of this Decree have been satisfactorily completed. Ecology shall provide such written notification or notice of any deficiencies in the completion of the requirements of this Decree within one hundred and eighty (180) days of receiving notice from Defendant that the requirements of the Decree have been satisfied. Within sixty (60) days of Defendant’s written notice that any noted deficiencies have been corrected, Ecology shall provide written notification that the requirements of the Decree have been satisfied or notice of any deficiencies that still remain. The provisions set forth in Section XV (Contribution Protection), Section XVI (Covenant Not to Sue Under MTCA; Reopeners), Section XXX (Indemnification), and other such continuing or reserved rights of Defendant, or Ecology under this Decree shall survive the termination of the Decree pursuant to this paragraph. This Decree shall in no way limit the authority of Ecology to obtain all legal or equitable remedies available against persons not party

1 to this Decree and against all persons, parties or non-parties, for releases of hazardous substances
2 at the Site not covered by this Decree.

3 **XXIX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

4 87. This Decree has been the subject of public notice and comment under RCW
5 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to a
6 more expeditious cleanup of hazardous substances, in compliance with applicable cleanup
7 standards, and is in the public interest.

8 88. If the Court withdraws its consent, this Decree shall be null and void at the option
9 of any party and the accompanying complaint shall be dismissed without costs and without
10 prejudice. In such an event, no party shall be bound by the requirements of this Decree. This
11 paragraph shall not create a basis for withdrawal of consent or termination of this Decree other
12 than those created by the terms of this Decree or that exist by operation of law or equity.

13 **XXX. INDEMNIFICATION**

14 89. Defendant agrees to indemnify and save and hold the State of Washington, its
15 employees, and agents harmless from any and all claims or causes of action for death or injuries to
16 persons or for loss or damage to the Site arising from or on account of acts or omissions of
17 Defendant, its officers, employees, agents, or contractors in entering into and implementing this
18 Decree. However, Defendant shall not indemnify the State of Washington nor save nor hold its
19 employees and agents harmless from any claims or causes of action arising out of the negligent
20 acts or omissions of the State of Washington, or employees or agents of the State, or its
21 contractors in implementing the activities pursuant to this Decree.

22 **XXXI. CLAIMS AGAINST THE STATE**

23 90. Defendant hereby agrees that they will not seek to recover any costs accrued in
24 implementing the remedial action required by this Decree from the State of Washington or any of
25 its agencies and further that Defendant will make no claim against the state toxics control account
26 or any local toxics control account for any costs incurred in implementing this Decree. Except as

1 provided above, however, Defendant expressly reserve their rights to seek to recover any costs
2 incurred in implementing this Decree from any other PLP.

3 **XXXII. EFFECTIVE DATE**

4 91. This Decree is effective only after the date on which title to the Site vests in
5 Defendant and the date on which the Decree is entered by the Court.

6 So ordered this ____ day of _____, 1999.

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9 _____
10 JUDGE
11 King County Superior Court
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1 The undersigned parties enter into this Prospective Purchaser Consent Decree on the date
2 specified below.

3 THE SEATTLE ART MUSEUM
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5

6 _____
Lynn Manolopoulos, WSBA #21069

7 DATED _____

DATED _____

8
9 CHRISTINE O. GREGOIRE
Attorney General, by and through

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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11
12 _____
LESLIE SEFFERN, WSBA #19503
13 Assistant Attorney General
Attorney for Plaintiff
14 State of Washington
Department of Ecology

15 _____
James Pendowski
Program Manager
Toxics Cleanup Program

16 DATED _____

DATED _____